STATE OF MICHIGAN

COURT OF APPEALS

CHAD S. MAXAM,

Plaintiff-Appellee,

v

CRYSTAL A. NIEMI, f/k/a CRYSTAL A. SNYDER,

Defendant-Appellant.

UNPUBLISHED
March 26, 2009

No. 280827
Van Buren Circuit Court
LC No. 02-049876-DC

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

In this child-custody dispute, defendant appeals by leave granted from the trial court order modifying parenting time from week on/week off to defendant having custody every other weekend and a no contact order between the child and defendant's current husband. We reverse and remand. This case has been decided without oral argument pursuant to MCR 7.214(E).

A custody decision is a discretionary ruling that is reviewed under an abuse of discretion standard. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). This Court will not reverse a custody order on appeal unless the trial court made findings of fact against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court committed clear legal error on a major issue. *Id*. at 877-881; *Powery v Wells*, 278 Mich App 526, 527; 752 NW2d 47 (2008); *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992). Clear legal errors occur when the trial court incorrectly chooses, interprets, or applies the law. *Powery*, *supra*.

Defendant argues the trial court abused its discretion when it affirmed the referee's decision to modify the established custodial environment based up a preponderance of the evidence.

The trial court may modify or amend a prior parenting time order only for proper cause shown or because of a change of circumstances. The party seeking the change in parenting time must prove the change in circumstances by a preponderance of the evidence. *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003); *Terry v Affum (On Remand)*, 237 Mich App 522, 534-535; 603 NW2d 788 (1999). If a change of circumstances is proven, the trial court must then determine if there is an established custodial environment. If there is, the party seeking to modify the custody order must demonstrate the change is in the child's best interest by

clear and convincing evidence. MCL 722.27(1)(c), MCL 722.23; *Powery, supra* at 528; *Foskett v Foskett*, 247 Mich App 1, 5-6; 634 NW2d 363 (2001); *LaFleche v Ybarra*, 242 Mich App 692, 695-696; 619 NW2d 738 (2000).

In the instant case, plaintiff established by a preponderance of the evidence that there had been a change in circumstances warranting modification of parenting time. *Vodvarka, supra*; *Terry, supra*. Plaintiff discovered in April 2006 that defendant's long-term boyfriend (now husband) was a registered sex offender. Defendant had knowledge of her husband's criminal background for many years but never informed plaintiff of this information. Dr. Lemmen, a forensic psychiatrist, testified the husband was at a moderate risk to re-offend. Lemmen stated a CSC sub-specialist would be most qualified to make a risk of recidivism determination. Dr. Brooks interviewed defendant but was neither a forensic psychiatrist, nor a CSC sub-specialist. While defendant's mother spoke in favor of the husband's relationship with the child, and child protective services found no evidence to substantiate allegations of sexual abuse by him, his juvenile CSC record is extreme. Further, although he has not sexually re-offended as an adult, he recently admitted to embezzling money from his former place of employment and frequented topless bars, both of which Lemmen testified are red flags for recidivism. The trial court's decision to place more weight on Lemmen's testimony was not against the great weight of the evidence. *Powery, supra* at 527; *Mauro, supra* at 4. Accordingly, plaintiff demonstrated by a preponderance of the evidence that there was a change in circumstances warranting modification of parenting time. *Vodvarka, supra*; *Terry, supra.*

Next, the referee determined, and neither party disputes, there was an established custodial environment prior to the instant action. Plaintiff's requested modification from week on/week off to defendant having custody every other weekend (and no contact between the child and defendant's husband) would result in a change in the established custodial environment. Because of this, plaintiff was required to demonstrate the change is in the child's best interest by clear and convincing evidence. MCL 722.27(1)(c), MCL 722.23; *Powery, supra*; *Foskett, supra*; *LaFleche, supra*.

It is not clear on the record whether the referee in fact applied the correct burden of proof (clear and convincing evidence) in the determination of whether to modify the existing custodial environment. The referee noted the appropriate burden, with case citation, in the initial recommendation and order. However, he mistakenly stated the "preponderance of the evidence" standard in the second recommendation following remand, and did so without case citation. Similarly, the trial court failed to indicate which standard it applied when accepting the referee's recommendations. Rather, it just found the referee's recommendations were appropriate and in the child's best interests. The failure to definitively use the correct burden of proof constitutes clear legal error. *Powery, supra*. On remand, the referee and trial court must review the record and determine whether plaintiff proved modification of the custody order was in the child's best interest by clear and convincing evidence.

Furthermore, we also find the trial court erred by failing to consider the best interest factors required by MCL 722.23. Neither the referee nor the trial court referenced the statutory best interest factors in their orders. Rather, the referee recounted the findings of fact and the referee and trial court both summarily stated the custody modification was in the child's best interest because it was neither reasonable to expect, nor possible to ensure compliance, with defendant staying away from her husband every other week. Because there was no reference on

the record by either the referee in his recommendations and order, or by the trial court in its order, to the best interest factors, a remand for such findings is required. *Rivette v Rose-Molina*, 278 Mich App 327, 329-333; 750 NW2d 603 (2008). A mere statement by the trial court that the referee's findings were in the best interests of the child is not a sufficient review of the best interest factors.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis